In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1498

THE TUNICA COUNTY SCHOOL DISTRICT
ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The pertinent opinions and orders below, none of which are reported, are set forth in the Appendix to the petition.

JURISDICTION

The judgment of the court of appeals (Pet. App. A27–A28) was entered on January 6, 1970. Timely petitions for rehearing and for rehearing *en banc* were denied on February 9, 1970 (Pet. App. A33–A34). The petition for a writ of certiorari was filed

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on April 28, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly disapproved the continued use of freedom of choice as petitioners' method of pupil assignment.

STATEMENT

This action was commenced in the summer of 1967 by the United States, which, pursuant to Title IV of the Civil Rights Act of 1964 (42 U.S.C. 2000c *et seq.*), sought an order requiring the desegregation of the Tunica County School District—a county-wide school system which serves an area with a population of approximately 17,000, of whom about 80 percent are Negro. There are at present about 3,000 Negroes and no whites attending the district's schools (Pet. 7–8).

On December 18, 1968, the United States moved for supplemental relief based upon this Court's decision in *Green* v. *County School Board,* 391 U.S. 430. The district court held freedom of choice unacceptable, and required submission of a new plan (Pet. App. A16–A17). Thereafter the district court ordered the adoption of an assignment plan based upon student scores on standard achievement tests (Pet. App. A18–A25). Implementation of this plan was to commence with the beginning of the 1969–70 school year. In September 1969, however, petitioners moved to postpone implementation of the plan and

for the continuation of freedom of choice. This motion was denied (Pet. App. A25–A26) and petitioners appealed. The court of appeals denied the relief and, on the authority of *Singleton* v. *Jackson Municipal Separate School District*, 419 F. 2d 1211 (C.A. 5), also required that the test score method of student assignment be replaced by a plan which promised achievement of a unitary system (Pet. App. A30–A32). The district court then ordered the immediate submission of a desegregation plan "based upon pairing, zoning, or a combination thereof" (Pet. App. A29), and the court of appeals thereafter denied rehearing (Pet. App. A33–A34).

ARGUMENT

1. The court of appeals correctly disallowed the continued use of freedom of choice as petitioners' method of student assignment. This Court held in *Green, supra,* that the burden is on those who wish to use such a system to demonstrate that their " * * * proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation." 391 U.S. at 439. In the *Green, Raney* and *Monroe* cases,[1] this Court ruled that freedom of choice was unacceptable because, after it had been in operation for three years, not more than 15 to 20 percent of the Negro children were attending tradi-

[1] *Raney* v. *Board of Education*, 391 U.S. 443; *Monroe* v. *Board of Commissioners*, 391 U.S. 450.

tionally white schools and student enrollment in the traditionally Negro schools remained all-Negro. In Tunica County, freedom of choice never resulted in more than three percent desegregation[2] and, as in *Green* and its two companion cases, the traditionally Negro schools have remained all-Negro (Pet. 7–8). On this record, therefore, *Green* is controlling, and the courts below correctly required petitioners to submit a plan to unitize the district's public schools.

2. The fact that all white students in Tunica County have left the public schools does not justify the re-establishment of freedom of choice. Petitioners admit that, because there is an absence of residential segregation, either zoning or pairing would result in complete desegregation if the whites would attend (Pet. 9). But petitioners argue that "white flight" has frustrated all attempts to desegregate and that the only way to recapture the white students is by permitting them to choose the school they will attend.

It is, of course, lamentable that the white parents of Tunica County have chosen to deprive their children of a public school education. If this hostility to school desegregation were, however, to be considered in defining petitioners' obligations, then these white parents would become the ultimate arbiters of the Constitution. That is precisely what this Court re-

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[2] Petitioners state that during the 1968–69 school year, Negroes constituted 15 percent of the total enrollment of the former white school. Thus, only approximately 98, or 3 percent, of the 3,000 Negroes in the district were desegregated (Pet. 7).

jected in *Monroe* v. *Board of Commissioners* (391 U.S. at 459):

> We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. "But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown II*, at 300.

See, also, *Cooper* v. *Aaron*, 358 U.S. 1, 16; *United States* v. *Indianola Municipal Separate School District*, 410 F. 2d 626, 631 (C.A. 5).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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